Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

SANDRA VASQUEZ,

Petitioner,

v.

JOHN SNOW, in his official capacity as SECRETARY OF THE TREASURY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner filed a claim for retaliation under Title VII, 42 U.S.C. § 2000e-3. Petitioner present her evidence and rested. The District Court granted Respondent's Rule 50 Motion because the retaliation did not result in an ultimate employment action and because the damage she suffered was mental anguish damages.

1. Whether a plaintiff must show an ultimate employment action rather than an adverse employment action to establish a claim for retaliation under Title VII.

2. Whether a plaintiff must show more than mental anguish damages in a Title VII claim to defeat a Rule 50 motion.

PARTIES TO THE PROCEEDING

Petitioner is Sandra Vasquez. Respondent is John Snow in his official capacity as the Secretary of the Treasury.

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Appendix A--Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit Dated and Filed September 15, 2003 . . . . . 1a

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Appendix C— Oral Order of the United States District Court for the Western District of Texas Granting the Rule 50 Motion to dismiss, September 11 2002 . . . . . 4a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit opinion (App. A), *Sandra Vasquez v. John Snow, in his official capacity as the Secretary of the Treasury* is not reported. The district court opinion (App. B.), styled *Sandra Vasquez v. John Snow, in his official capacity as the Secretary of the Treasury* is not reported. The district court's oral ruling (App. C) in *Sandra Vasquez v. John Snow, in his official capacity as the Secretary of the Treasury* is not reported but is included in the Appendix to provide the Court a full rendition of the reasons for the district court's decision.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 15, 2003. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the statutory provisions of 42 U.S.C. section 2000e.

Section 2000e-2(a)(1) provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."

Section 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment for . . . because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10-12 (July 14, 1992) provides:

> The existence, nature, and severity of emotional harm must be proved. Emotional harm *may* manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches. . . .

STATEMENT OF THE CASE

A. Pertinent Facts.[1]

From 1995 to 1999, Sandra Vasquez, a Hispanic female, was employed in the Austin Financial Center, a division of the Department of the Treasury. During her employment plaintiff was subjected to a hostile work environment, discrimination and retaliation.

The first instance of discrimination was in December 1995. The position of computer operator in the Center's computer room became available. Ms. Vasquez applied for this position. Pat Vineyard, a white female, was selected for the position. The individuals selecting the computer operator were Dennis Marek, Ms. Vasquez's supervisor and Joseph Labermeyer, another supervisor. At that time, Petitioner accepted she had not been selected for the position because Ms. Vineyard was the better-qualified applicant. However, in July 1999, Mr. Marek, Petitioner's supervisor informed her that she was the better-qualified candidate for the position in 1995.

In January 1996, plaintiff received an "excellent" appraisal rating instead of "outstanding," despite the fact that she had done everything on her employee work plan required to receive an "outstanding" rating. Plaintiff asked Supervisor Marek what else she needed to do in order to receive an "outstanding" rating. He acknowledged her underrating and apologized, but did not upgrade her appraisal.

The discrimination continued in 1997. Supervisor Marek treated a white male differently by requiring a leave slip from Petitioner when she was late but not from a white male that was late on the same day. Petitioner brought the

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1 Pertinent facts are taken from the Record Excerpts filed by Petitioner at the United States Circuit Court of Appeals for the Fifth Circuit in support of her appellate brief.

disparate treatment to the attention of Mr. McReynolds, an upper level supervisor, who stated that he would talk to Mr. Marek. However the unequal treatment continued.

In August 1997, Petitioner was working in computer operations. The group was short-handed and she ended up doing the volume of work that was normally assigned to three people. Two of her senior operators, Jack Claiborne and Tobbey Torres, noticed the work Petitioner was doing and recommended that Supervisor Marek give her a Special Act Award, a monetary award that recognizes special efforts. Supervisor Marek responded that he did not have time to work on the paperwork for the award, paperwork he admitted would take only 15 minutes.

In 1998, Supervisor Marek commented to Olga Garcia that all "blacks and Mexicans" belonged in the fields and not in an office. In 1998, Tobbey Torres and Jack Claiborne both retired. Both were lead operators under Supervisor Marek. Supervisor Marek bought Jack Claiborne, the white employee, a $100.00 gift certificate. He bought Mr. Torres, the Hispanic employee, a watch from a pawnshop.

In 1999, when Petitioner came in late to work, Supervisor Marek would immediately ask her for a leave slip. However, white non-Hispanic employees, would come in 15 to 30 minutes late on the same day and Supervisor Marek would not ask them for a leave slip. This different treatment was noticed by Petitioner and by two of her co-workers. This different treatment was significant because time included on a leave slip for being late would be assessed against paid leave. White, non-Hispanic employees that were not required to submit leave slips would not have their leave time diminished in the same manner.

White employees were also treated differently when they made a mistake. A minority employee that made a mistake would be rudely and publicly reprimanded in a loud voice by Supervisor Marek in front of co-workers. However,

a white employee was not subjected to the same treatment. Witness Stanford, a black co-worker, testified to a specific example. Supervisor Marek, believing that Mr. Stanford had made a mistake, confronted him in the Center's cafeteria, yelling at him in front of co-workers; however, when Mr. Stanford informed him that a white employee had made the mistake, Supervisor Marek simply left the matter alone and did not confront the white employee. In another incident, a white employee called Mr. Stanford, "Buckwheat." Supervisor Marek laughed when he heard the comment and did not reprimand the white employee or try to stop her from repeating the comment.

Still another incident of different treatment of minorities and whites involved scratching tapes, a tedious job. Minorities working for Supervisor Marek were always asked to perform this job when work was slow, however, Supervisor Marek allowed a white employee to play solitaire on her computer and did not ask her to help in this task. Another incident of different treatment involved the sign-in log. Supervisor Marek required minority employees to sign-in and out but he did not reprimand white employees that did not do so.

Another incident of different treatment was the NDM log. Petitioner developed the procedure of noting incoming work on the NDM log to minimize mistakes and requested all employees on Supervisor Marek's shift to participate. All minority employees participated, a white employee did not. Petitioner brought this to Supervisor Marek's attention but he declined to require the white employee to participate. Later, however, when Petitioner submitted the employees who did participate for an award, she was asked why she had not submitted the white employee for that same award. The white employee was then nominated for the award by an upper level supervisor, even after that supervisor had been told why the white employee had not been submitted.

On July 27, 1999, Petitioner learned that she had once again not been chosen to attend an out of town training, despite her repeated requests. Supervisor Marek had submitted a white employee's name instead. Supervisor Marek testified that he submitted the white employee's name partly as a reward for the fact that she had volunteered for the midnight shift during the busy season of February to May. However, Petitioner had volunteered for the midnight shift in 1998 but did not receive any special consideration.

At this point, Petitioner filed an EEO complaint. After that, Supervisor Marek refused to speak to her for a month. He also refused to provide her training while providing it to a white non-Hispanic female. In addition, Supervisor Marek began to treat the white, non-Hispanic female as lead operator, which was Petitioner's position. Other co-workers noted this new treatment by Supervisor Marek.

On September 26, 1999, Darla Vowell learned that she was one of the white non-Hispanic employees plaintiff had identified in her EEO complaint as receiving better treatment by management. She, in turn, sent an inflammatory e-mail to several individuals accusing Petitioner of discriminating against her because she was not a minority. Petitioner brought the e-mail to the attention of Supervisor Marek, and asked him to address it with the employee. Mr. Marek acknowledged that he had never seen Petitioner discriminate. However, he refused to address the matter, stating that he believed that the matter would go no further and that the white employee could say whatever she wanted. Meanwhile, the white employee continued to make her baseless accusation through rumor and innuendo rather than proceeding with a straightforward complaint with the proper authorities that would permit the matter to be investigated and addressed as Petitioner had requested.

In September and October 1999, Petitioner was subjected to continued discrimination. She was the subject

of a disturbing and offensive e-mail from Mr. Daniel O'Donoghue, which was sent to the entire center and contained offensive and obscene language. In spite of Petitioner's requests to management to address the issue, they did not, thus, condoning Mr. O'Donoghue's email.

In September/October 1999, commendations received by Ms. Vowell, the white employee, were sent to two levels of upper management, commendations received by Petitioner were merely sent to the next level of management, depriving Petitioner of recognition by upper management.

In October 1999, after Petitioner filed the EEO complaint, the attempts she made to recognize the operators who worked in her group were met with heightened scrutiny. Petitioner was questioned as to why she was omitting a white operator, despite the fact that no such justification was necessary and she was asked to provide documentation in support of her submission. Documentation had never been required before and under the center's regulations, was not required. Finally, in November 1999, because of the retaliation, discrimination and hostile work environment, Petitioner left her position at the Financial Management Center. At that time she received an appraisal with an "outstanding" rating. An employee who receives an "outstanding rating" is considered for a Superior Sustained Performance ("SSP) award. Moreover, individuals who leave before the awards are distributed have received this merit award. Tobbey Torres, for example, received a merit award, even though he left before it was distributed. However, Petitioner was informed that she would not be considered for a SSP award.

Petitioner suffered mental anguish as a result of the employer's actions, including sleeplessness, hair loss, muscle spasms, clenched jaws, short-temperedness, crying, and depression (treated with anti-depressants). Petitioner provided medical records, her testimony and the testimony of a co-worker who noted her increased stress reactions.

In summary, through her testimony, the testimony of Dennis Marek, Patrick Stanford, Tobbey Torres, Olga Garcia and Judy Caldwell, Petitioner showed a minimum fifteen specific instances of discrimination. Moreover, through her testimony and the testimony of co-workers, Petitioner provided evidence that the hostile treatment she received from Supervisor Marek was not isolated but rather daily, constant harassment, which increased significantly after she filed her EEO complaint. Further, the testimony of Tobbey Torres also provided evidence of the ongoing constant hostile environment experienced by minorities at the Center.

B. Proceedings Below

Petitioner Sandra Vasquez ("Ms. Vasquez") instituted an action seeking compensatory damages against the Department of the Treasury ("the Treasury") for violation of her civil rights under 42 U.S. C. Section 2000-e. The jurisdiction of the district court was invoked under 28 U.S.C, section 1331 (general federal question).

In particular, Petitioner contended that Respondent discriminated against her because of her national origin, Mexican-American, by treating non-Hispanic employees in the same circumstances differently. Further, Petitioner contended that Respondent, through its employees and her supervisors, created a hostile work environment by subjecting her to harassment based upon her national origin. This harassment included favorable treatment for whites at the expense of minorities, racial remarks, and retaliation after she filed her complaint of discrimination. Petitioner also made a separate claim for retaliation. Finally, Petitioner contended that Respondent, through the hostile work environment and retaliation, constructively discharged her from her position with the Department of the Treasury.

At trial, Petitioner offered 41 exhibits for admission, and in two days of testimony, presented six different witnesses. The witnesses were: (1) Petitioner, Sandra

Vasquez, a Mexican-American female, (2) Dennis Marek, a white male and Petitioner's supervisor for all but six months of Petitioner's employment at the Center, (3) Judy Caldwell, a white female and Petitioner's supervisor for six months, (4) Tobbey Torres, a Mexican-American male who worked with Petitioner under Dennis Marek's supervision in 1997 and 1998, (5) Patrick Stanford, a black male, who also worked with Petitioner under Dennis Marek's supervision in 1998 through 1999, and (6) Olga Garcia, a Mexican-American female, who was the administrative secretary of the Center's manager.

After Petitioner rested, Respondent moved for a judgment under Rule 50 of the Federal Rules of Civil Procedure, claiming that Petitioner had not offered sufficient evidence to present jury issues on her claims, and moreover, that she had not offered sufficient evidence of damages as a result of any discrimination, retaliation or hostile environment.

The United States District Court Judge granted the motion, finding that Petitioner had not suffered an adverse employment action, and that the hostile work environment was not severe and pervasive enough to establish a Title VII violation. He also found that Petitioner had not offered sufficient evidence on damages. The district court then entered judgement for the Respondent .

Petitioner timely filed her appeal and briefed the issues to the Fifth Circuit Court of Appeals. The Fifth Circuit summarily upheld the district court's judgment.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Fifth Circuit Court of Appeals conflicts with Decisions of Other Circuit Courts of Appeal.

Title VII of the Civil Rights Act of 1964 forbids discrimination because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. See 42 U.S.C. section 2000e-3(a). To establish a claim for retaliation under § 2000e-3(a), a plaintiff must demonstrate: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir. 2001). The Fifth Circuit requires that an "adverse employment action" in a retaliation claim be an ultimate employment decision. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied* 522 U.S. 932 (1997).

Petitioner filed an action under the anti-retaliation provisions of Title VII but the District Court granted the Rule 50 Motion, finding that Petitioner had not made a claim for retaliation because "she continued to do her job and it's not the type of retaliation that had an employment result." App. C . Petitioner did not show that she suffered an ultimate employment decision. [2] The Fifth Circuit summarily affirmed the decision of the district court without opinion. Thus, it must be assumed that it relied on established Fifth Circuit decisions and the District Court's reasoning.

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2 Petitioner did contend that she was constructively discharged, but failing that, Petitioner did provide evidence that she received heightened scrutiny, her supervisor refused to speak to her for a month after she filed her EEO complaint, and management tolerated co-worker harassment.

In particular, the court appears to rely on the *Mattern* opinion in which the court held that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that might have some tangential effect upon those ultimate decisions." 104 f.3d at 707. Ultimate employment decisions include hiring, granting leave, discharging, promoting and compensating. Id. Thus, the law in the Fifth Circuit is that an employment action, even if adverse, would not support a retaliation claim unless it is an ultimate employment decision such as refusal to hire, refusing leave, discharging, failure to promote and effects on compensation. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*,261 F.3d 512, 519 (5th Cir. 2001), *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000), and *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 402 (5th Cir. 2000), *cert. denied* 532 U.S. 937 (2001).

The Eight Circuit has agreed with the Fifth Circuit, see *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997), finding that only adverse employment actions that "rise to the level" of an ultimate employment decision are intended to be actionable under Title VII. [3]

However, six other circuits disagree with the Fifth Circuit. The Tenth Circuit has recognized that employment actions, including co-worker retaliatory harassment, if

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3 While the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, the court has usually applied a more liberal standard. See e.g., *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (ultimate employment decision includes "tangible change in duties or working conditions that constituted a material employment disadvantage"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, "papering" of an employee's file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended").

sufficiently severe, may constitute an adverse employment action for purposes of a retaliation claim. *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) See also *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996)(the anti-retaliation provision reaches beyond ultimate employment decisions and protects an employee from a malicious prosecution action brought by former employer).

The Seventh Circuit has found that it is not necessary for plaintiff to show that she was disciplined, fired, denied a raise, threatened with discharge, or given a negative evaluation to establish an adverse employment action. Significantly reduced material responsibilities can constitute an adverse employment action. *Flaherty v. Gas Research Institute*, 31 F.3d. 451, 456-67 (7th Cir. 1994). The Ninth and First Circuits have similarly held that Title VII's protection against retaliatory discrimination extends to adverse acts that fall short of ultimate employment decisions. See *Fielder v. UAL Corp.*, 218 F.3d 973, 984-85 (9th Cir. 2000) *vacated on other grounds*, 536 U.S. 919 (2002) ("recogniz[ing] the vital remedial role of Title VII, we hold, therefore, that Title VII's protection against retaliatory discrimination extends to employer liability for co-worker retaliation that rises to the level of an adverse employment action") and *Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir. 1994) (Actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees can be adverse employment action for the purpose of establishing a claim for retaliation).

The Eleventh Circuit in *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." Thus, the plaintiff's evidence of (1) being listed as a no-show when she was scheduled to have off, (2) being

required to work without a lunch break, (3) two written reprimands (during her 11 month tenure at her employment she had not received any reprimand), (4) solicitation by her supervisor for negative statements about the plaintiff, (5) threats from her supervisor when she wanted to call headquarters, and (6) delaying medical treatment established adverse employment actions sufficient to establish retaliation. Id. at 1455, 1457.

In *Von Gunten v. State of Maryland*, 243 F3d 858, (4th Cir. 2001), the Fourth Circuit noted that:

> Conduct short of "ultimate employment decisions" can constitute adverse employment action for purposes of § 2000e-3. Of course, 'ultimate employment decisions' -- to hire, discharge, refuse to promote, etc. -- can constitute the necessary adverse employment action, but "retaliatory harassment" can also comprise adverse employment action. (citation omitted). What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected "the terms, conditions, or benefits" of the plaintiff's employment." (Citation omitted).

243 F.3d at 865.

Petitioner submits that the reasoning of the First, Fourth, Seventh, Ninth , Tenth and Eleventh Circuit Courts[4] are consistent with Title VII and the Supreme Court's construction of other Title VII claims.

For a hostile work environment, an adverse employment action need not be a tangible employment action. Section 2000e-2(a)(1) provides:

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4 The D.C. Circuit, in construing the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, has held that the clause is not limited to actions "that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem Soc'y,* 935 F.2d 322, 331 (D.C. Cir. 1991)

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."
>
> Section 2000e-3(a) provides:
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment for . . . .because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Thus, an adverse employment action for purposes of establishing a hostile work environment maybe one that discriminates by affecting or altering the terms and conditions of employment, then Petitioner submits that if the hostile work environment is so severe and pervasive that it affects and alters an employment condition, it would also be an adverse employment action or "discrimination" sufficient to establish retaliation under 2000e-3.

In further support, Petitioner would note that the Supreme Court has used the phrase "tangible employment action " which supports the construction that an "adverse employment action" need not be an "ultimate employment action." The Supreme Court has set out a relatively broad definition of "tangible employment action" in the sexual harassment context. A significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" can constitute a tangible employment action. *Burlington Industries, Inc. v.*

Ellerth, 524 U.S. 742,761(1998); *see also Faragher v. City of Boca Raton* , 524 U. S. 775 (1998), (stating that tangible employment actions include "hiring, firing, promotion, compensation, and work assignment"). This definition of "tangible employment action" developed in the sexual harassment context in *Burlington Industries* has been recognized as a potential "adverse employment action" for Title VII retaliation claims. See *Watts v. Kroger Co.*, 170 F.3d 505, 510 n.4, 511 n.5 (5th Cir. 1999). However, this recognition was only dicta which has not been expanded on by the Fifth Circuit.

Accordingly, Petitioner submits that if she lived in the First, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits, her evidence would be sufficient to establish an adverse employment action sufficient to establish a retaliation claim. Petitioner submits that she was subjected to intensified hostility by her direct supervisor, which caused her mental anguish. Further she suffered co-worker harassment which was accepted and condoned by management. These adverse employment actions were causally linked to Petitioner's filing of the EEO complaint. See *Sherrod v. American Airlines*, 132 F.3d 1112, 1122 (5th Cir. 1998)and see *Simmons v. Camden County Bd. of Ed.*, 757 F.2d 1187, 1189 (11th Cir. 1985).

Thus, this Court should act to make the law consistent throughout the circuits and adopt the principle that an adverse employment action in a retaliation claim is not limited to "ultimate employment actions" as currently required by the Fifth Circuit.

II. Whether an employee must show any other damages other than mental anguish damages to establish a claim for retaliation or hostile work environment.

The District Court found that the only damages suffered by Petitioner was mental anguish and thus she had no cognizable claim. However, mental anguish damages are sufficient to establish a claim for retaliation or hostile work environment. .

For hostile work environment claims, a plaintiff need not show any monetary damage or tangible employment action. See, *Faragher v. City of Boca Raton,* 524 U. S. 775 (1998). In that event, plaintiff need only show mental anguish. See *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 229 (1994). In *Landgraf*, the Supreme Court discussed the 1991 amendments to Title VII, noting that:

> Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have justified any relief under Title VII. As this case illustrates, even if unlawful discrimination was proved, *under the prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensat*ion, or termination. (Citation omitted). *Section 102(of the 1991 Act), however, allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the terms, conditions, or privileges of employment, even though the discrimination does not involve a discharge or a loss of pay.* In short, to further Title VII's central statutory purpose of eradication of discrimination throughout the economy and making person whole

> for injuries suffered through past discrimination (citation omitted) 102 of the 1991 Act effects a major expansion in the relief available to victims of employment discrimination."

511 U.S. at 254. (emphasis added).

Under *Landgraf*'s construction, compensatory damages such as mental anguish damages are recoverable. Thus, plaintiff need only show that she did suffer mental anguish to recover. Mental anguish is established by evidence that there is a "specific discernable injury to the claimant's emotional state," proven with evidence regarding the "nature and extent" of the harm. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, 940 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997). The EEOC guidelines provide:

> * * * Emotional harm *may* manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches....

EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10-12 (July 14, 1992) (footnotes omitted) (emphasis added).

In this instance plaintiff provided detailed information on her mental anguish, including medical records, and co-worker testimony.

III. The Questions presented are Important.

The questions presented are important. The outcome of this matter would affect the rights of employees throughout the country. Employees should be able to rely on the same rights and remedies available to them in each region of the country. An employee should not be deprived of certain rights simply because he or she moves from Florida to Texas, for example. Similarly, employers should have a consistent standard to which they must adhere in complying with Title VII requirements. A company with offices in Texas and California should not be required to administer with two different sets of law in complying with Title VII. Under current law, an employee of the same company would have a different result in Texas than an employee of the same company working in California. Thus, this Court should act to make the law consistent throughout the Circuits.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A-OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 15, 2003

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-51131

SANDRA VASQUEZ,

Plaintiff-Appellant,

Versus

JOHN SNOW, in his official capacity as the Secretary of the Treasury,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
USDC No. A-01-CV-508-SS

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 5TH Cm. R. 47.6.

IT IS FURTHER ORDERED that costs on appeal are to be taxed against plaintiff—appellant.

Clerk , U. S. Court of Appeals, Fifth Circuit
By /s/ JH Deputy

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. *47.5.4.*

APPENIDX B -JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED AND SIGNED SEPTEMBER 13, 2002, FILED SEPTEMBER 16, 2002

IN THE UNITED STATES DISTRICT COUR
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-O1-CA-508-SS

SANDRA VASQUEZ
-vs-

PAUL H. O'NEILL, in his official capacity as the Secretary of the Treasury

FINAL JUDGMENT

BE IT REMEMBERED on the 9TH day of September 2002 the Court called the above-captioned case, and all parties appeared and announced ready for trial and a jury of seven duly and legally qualified jurors having been empaneled, and this case proceeded to trial, and on the 10TH day of September 2002, the plaintiff rested her case and the defendant filed a motion for judgment pursuant to Rule 50 of the Federal Rules of Civil Procedure, and after a review of the same, the Court granted the motion for judgment and, based on the pleadings and evidence presented in trial and the order granting judgment, and therefore, the Court enters the following:

IT IS ORDERED, ADJUDGED, and DECREED that the plaintiff Sandra Vasquez take nothing in this cause against Paul H. O'Neill in his

Appendix B

official capacity as Secretary of Treasury, and

IT IS FURTHER ORDERED that each party herein shall absorb her or its own costs. The reason for the division of costs rather than taxing costs to Sandra Vasquez is the plaintiff Sandra Vasquez presented a sufficient record to overcome a motion for summary judgment, and the evidence presented in trial was troubling, although insufficient, as a matter of law, for recovery of money damages. The Court strongly suggests that the Department of Treasury thoroughly investigate the allegations in this lawsuit and ensure solution to the problems described in trial.

This is a final judgment, and all further relief requested by any party is herein DENIED.

SIGNED this the13th day of September 2002.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX C –ORAL RULING ON RULE 50 MOTION, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, ENTERED SEPTEMBER 10, 2002

Case No. A-O1-CA-508-SS

SANDRA VASQUEZ
-vs-

PAUL H. O'NEILL, in his official capacity as the Secretary of the Treasury

* * *

THE COURT: Well, there's no question that the evidence shows or there's certainly sufficient for one to think that it was not pleasant for a minority to be down there and that a sensitive person could have mental anguish. But I see no evidence in this record of actionable hostile work environment so pervasive that it affected the employment relationship.

The truth of the matter is, the evidence is without dispute Ms. Vasquez continued on, did a good job, and by all testimony, including Marek's, was an outstanding employee.

THE COURT: * * * I don't doubt this lady had mental anguish. I don't doubt that I would have mental anguish somebody treated me like the evidence establishes, but is it actionable under the federal law?

* * *

THE COURT: * * * I see no actionable cause of action. I just see a very pathetic picture of a government department that needs to clean up and that needs to clean up well. I'm going to grant judgment on behalf of the defendant. I can't submit any issue to the case. There is no damages within the

authority of the Fifth Circuit on any of the causes of action. The closest you come is retaliation and it's just insufficient.

At the time of retaliation after the July notice of discrimination complaint, I don't know who retaliated most, Ms. Vasquez or Mr. Marek. But in any event, she continued to do her job and it's not the type of retaliation that had an employment result. I don't blame this lady at all for taking a better job, extrapolating herself from the situation.

LILY REZNIK, COURT REPORTER
U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

Supreme Court, U.S.
FILED
FEB 19 2004
OFFICE OF THE CLERK

(2)

No. 03-887

In the Supreme Court of the United States

SANDRA VASQUEZ, PETITIONER

v.

JOHN SNOW, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of the Department of Treasury was entitled to judgment as a matter of law on petitioner's claim that the agency retaliated against her for exercising her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the Secretary was entitled to judgment as a matter of law on petitioner's hostile work environment claim.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not published in the *Federal Reporter* but is *reprinted in* 75 Fed. Appx. 275, and is *available in* 2003 WL 22121028. The opinion of the district court (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2003. The petition for a writ of certiorari was filed on December 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1995, petitioner Sandra Vasquez began working as a computer operator at the Financial

Management Service (FMS) in the Department of Treasury. Dennis Marek was her supervisor. 1 Tr. 72. In 1998, petitioner was selected as lead operator on Marek's shift and was responsible for distributing work to other computer operators. *Id.* at 20-21.

During her career at FMS, petitioner received regular promotions and salary increases: She began as a GS-7, Step 1 employee, and rose to GS-10, Step 2; her salary rose from $24,038 to $37,582 per year. 1 Tr. 70-71; Exh. D-4. Petitioner also received ten monetary awards totaling $3000.80. 1 Tr. 73-74; Exh. D-6. Petitioner's supervisors rated her performance "outstanding," with the exception of her first rating, when she received an "excellent." 1 Tr. 73-74; 2 Tr. 27. While employed at FMS, petitioner attended seven in-house training courses. Exh. D-8.

In 1998, FMS provided off-site training for one lead operator and a computer operator from another shift. 1 Tr. 76-77. Neither petitioner nor anyone else from Marek's shift attended the training. *Ibid.*; Exh. D-13. Petitioner requested consideration for the next out-of-town training, and Marek forwarded her request to his supervisor. *Ibid.*

In February 1999, petitioner applied for another FMS position. 2 Tr. 28-30. That same month, however, petitioner announced that she was leaving FMS, 1 Tr. 69, 79; Exh. D-10, at 7, and petitioner withdrew from consideration for the FMS position before her interview. 1 Tr. 70; 2 Tr. 21-22, 29-30. In July 1999, petitioner applied for a position at the Department of Veterans Affairs. 1 Tr. 70, 83.

In that same month, a computer operator other than petitioner was selected for an out-of-town training on claim processing because that person had experience in that area and had volunteered to work on the midnight

shift during tax season. See Exh. D-10, at 9-10, 28-30; 2 Tr. 46. Petitioner was upset when she heard that she had not been selected. 1 Tr. 83. The next day, petitioner contacted an EEO counselor. 1 Tr. 64. She also requested that the FMS personnel supervisor immediately transfer her. 1 Tr. 83-84; Exh. D-14. FMS agreed to transfer petitioner, but she retracted her request. Exhs. D-14, D-15; 1 Tr. 35, 85.

In September 1999, petitioner filed a formal complaint of discrimination with the agency. 1 Tr. 64, 84. The following day, petitioner applied for an FMS vacancy for a Computer Specialist position. 1 Tr. 70. In November 1999, Marek signed a performance evaluation of petitioner giving her a summary rating of "outstanding." 1 Tr. 110-111. Shortly thereafter, petitioner resigned, claiming constructive discharge. 1 Tr. 55-56. The next day, petitioner began working for the Department of Veterans Affairs at a higher graded position with greater pay. 1 Tr. 71-72.

2. In August 2001, petitioner filed suit in federal district court, alleging that FMS retaliated against her for filing an EEO complaint, and that she was subject to a hostile work environment on account of her national origin during her career at FMS. The case went to trial. At the close of petitioner's evidence, the government moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The district court granted the motion, and entered judgment for the Secretary. Pet. App. 2a. The court found no evidence of "actionable hostile work environment so pervasive that it affected the employment relationship." *Id.* at 4a. The court further found the alleged retaliation did not have any "employment result." *Id.* at 5a.

3. In an unpublished, per curiam opinion, the court of appeals affirmed the district court's judgment without explanation. Pet. App. 1a.

ARGUMENT

1. Petitioner contends that the Court should grant review to resolve a conflict in the circuits on whether a Title VII plaintiff must show an ultimate employment action in order to state a retaliation claim. According to petitioner, two circuits require proof that retaliation has taken the form of an ultimate employment decision, while six other circuits permit proof that retaliation has taken the form of an adverse employment action that falls short of an ultimate employment decision. Review of that question is not warranted in this case for three reasons.

First, the court of appeals' unpublished and nonprecedential decision in this case does not present the question whether retaliation must take the form of an ultimate employment decision. The court of appeals affirmed *without explanation or opinion* a district court judgment in favor of the Secretary on petitioner's retaliation claim. It did not indicate that it was applying the "ultimate employment decision" rule that petitioner now seeks to challenge. Indeed, even petitioner is left to suggest that "it must be assumed" that the panel was implicitly relying on prior Fifth Circuit precedents embracing the "ultimate employment decisions" test. Pet. 10. Nor did the district court apply an "ultimate employment decision" test; rather, it ruled against petitioner based on a finding that the alleged retaliation did not have "an employment result." Pet. App. 5a. In any event, whatever rule the district court applied, the court of appeals' unpublished disposition only affirmed the district court's judgment, not its reasoning. And

the court of appeals did not itself announce any standard for its rejection of petitioner's retaliation claim.

Second, it is unclear that there is any real difference in practice between the "ultimate employment decision" standard to which petitioner objects and the "adverse employment action" standard that petitioner contends should be adopted. As petitioner concedes, see Pet. 11 n.3, while the Eighth Circuit has agreed with the Fifth Circuit and adopted the "ultimate employment decision" standard, that court has defined an ultimate employment decision to include any "tangible change in duties or working conditions that constituted a material employment disadvantage." *Manning* v. *Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). The Eighth Circuit has also held that an ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, negative reviews, and reprimands. *Kim* v. *Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997). Those descriptions of the applicable standard do not differ in any appreciable way from the standard that petitioner favors.

Third, petitioner has failed to show that she would benefit from the adverse employment action standard as it has been applied by the six circuits on which she relies. Petitioner relies on two forms of alleged retaliation. First, she alleges that her supervisor engaged in various acts of harassment, such as failing to talk to her, treating a different person as the lead operator, and increasing the level of scrutiny of her decisions. Pet. 6-7. Second, she alleges that two co-employees wrote e-mails to which she objected: one of the e-mails alleged that she had engaged in discrimination, the other contained offensive language. In petitioner's view, management did not respond adequately to those e-mails.

Ibid. None of the circuits on which petitioner relies has held that such conduct is sufficient to make out a retaliation claim.

The Tenth Circuit has held that "co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute [an] 'adverse employment action' for purposes of a retaliation claim." *Gunnell* v. *Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998)). But the conduct discussed in *Gunnell* involved a co-worker's institution of a malicious prosecution action, at the employer's behest, against the employee. *Id.* at 1264 (citing *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 986-987 (10th Cir. 1996)). The court did not suggest that two co-worker e-mails, one complaining about discrimination, the other offensive, would be sufficiently severe to constitute an adverse employment action.

Furthermore, the Tenth Circuit held that "an employer can only be liable for co-workers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers' actions." *Gunnell*, 152 F.3d at 1265. Petitioner did not allege that management orchestrated co-worker harassment, and she failed to show that management condoned co-worker harassment. Indeed, petitioner acknowledges that her supervisor agreed that she did not discriminate against the co-worker who wrote the first e-mail, see Pet. 6, and the record shows that after petitioner complained about the e-mails, the Director of FMS's Austin Financial Center sent an e-mail to all employees stating that "[t]his is to remind all Austin Financial Center employees that we are required to deal with others, especially our coworkers, in a courteous and businesslike manner," and that "[a]ll inter-

personal dealings within this center, including, but not limited to, e-mails, conversations, telephone calls and correspondence, MUST comply with the standards." Exh. D- 23, 1 Tr. 103-104.

Although the Ninth Circuit has held that retaliation can include harassment by co-workers, the court made clear that Title VII protects against only such co-worker retaliation "that rises to the level of an adverse employment action." *Fielder* v. *UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000), vacated on other grounds, 536 U.S. 919 (2002). The alleged co-worker retaliation in the present case did not rise to that level.

Nor does the First Circuit's decision in *Wyatt* v. *City of Boston*, 35 F.3d 13 (1994), support petitioner's claim that she suffered actionable retaliation. In that case, the court stated in dicta that, apart from discharge, "other adverse actions are covered by" Title VII's anti-retaliation provision, including "toleration of harassment by other employees." *Id.* at 15-16. But the court did not suggest that two co-employee e-mails are sufficient to establish actionable retaliation, and, as discussed above, petitioner failed to establish that there was "toleration" by management of any harassment. Moreover, the plaintiff in *Wyatt* alleged that he had been discharged in retaliation for filing an EEO complaint, and therefore alleged an ultimate employment decision as part of his prima facie case. *Id.* at 14, 16.

The Seventh Circuit has held that "significantly diminished material responsibilities" can constitute an adverse action. *Flaherty* v. *Gas Research Institute*, 31 F.3d 451, 456 (7th Cir. 1994)). But petitioner has failed to show that her material responsibilities were significantly diminished after she initiated the EEO process. Although she alleged that her supervisor treated her

differently, she did not present evidence that her actual duties, position, or benefits changed in any material respect.

In *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998), the plaintiff presented evidence that (1) she was improperly listed as a no-show on a day she was scheduled to have off, and that when she brought this to her manager's attention he required her to work without a lunch break; (2) she received two written reprimands and was suspended for one day from employment; (3) her manager solicited negative comments about her; (4) when she stated that she intended to call headquarters to ask why she had not been scheduled to work on a particular day, an assistant manager threatened to shoot her in the head; and (5) when she had an allergic reaction at work, an assistant manager needlessly delayed authorizing necessary medical treatment. *Id.* at 1455. The Eleventh Circuit held that these actions "*considered collectively* are sufficient to constitute prohibited discrimination" under Title VII's anti-retaliation provision. *Id.* at 1456 (emphasis added). The actions about which petitioner complains do not remotely approach the treatment of the plaintiff in *Wideman.*

Petitioner's reliance on *Von Gunten* v. *Maryland*, 243 F.3d 858, 866 (4th Cir. 2001), is similarly misplaced. There, the Fourth Circuit held that in order to establish actionable harassment, a plaintiff must prove that she has suffered an adverse employment result that has caused a change in the terms and conditions of her employment. *Id.* at 867-870. Applying that principle, the Fourth Circuit ruled that allegations that plaintiff suffered from greater scrutiny from management after the filing of an EEO complaint, that other employees were not similarly scrutinized, and that the employer

did not sufficiently address her complaints was not evidence of an adverse employment result or a change in the terms and conditions of her employment. *Id.* at 869. Petitioner's allegations are similar to the allegations rejected in *Von Gunten.* As in that case, petitioner failed to show any adverse employment result or change in the terms or conditions of her employment.

In sum, because there is no indication that the Fifth Circuit applied the "ultimate employment decision" standard in this case, because that standard may not differ in practice from the adverse employment action standard that petitioner favors, and because petitioner has not shown that she would have stated a claim in any other circuit, review of petitioner's first question is not warranted.

2. Petitioner also contends (Pet. 16-17) that certiorari is also warranted to decide whether emotional distress damages are sufficient to prove a hostile work environment claim under Title VII. Review of that question is not warranted.

Under this Court's decisions, an employee's showing that she has suffered emotional distress is not sufficient by itself to establish actionable harassment. An employee must show that conditions were objectively so severe and pervasive as to result in a change in the terms and conditions of employment. *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). To determine whether an environment is sufficiently hostile or abusive to be cognizable under Title VII, courts must look at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Reviewing those considerations, the district court concluded that petitioner failed to establish actionable harassment. The court stated that "I see no evidence in this record of actionable hostile work environment so pervasive that it affected the employment relationship." 2 Tr. 122. The evidence fully supports the district court's finding.

The court rejected petitioner's allegation that the agency discriminated against her by not selecting her for off-site training in 1999. 2 Tr. 121. The court explained "Why would anybody send [petitioner] to training after she started in February of '99, indicating she was seeking other employment? It would be irresponsible to send her to training at that point in time." *Ibid.* And, as the record shows, the training was offered to another computer operator because of her experience processing claims, and as a reward for volunteering to work on the midnight shift during tax season. Exh. D-10, at 9-10, 28-30; 2 Tr. 46.

As the district court judge further concluded, the evidence is "without dispute [that petitioner] continued on, did a good job, and by all testimony, including [her supervisor's], was an outstanding employee." 2 Tr. 122. Petitioner "got all the raises that she was entitled to. She got the promotions that she sought, and she got a better job when she left." 2 Tr. 125. In addition, the district court found that "when I look at what the case law is across the country," petitioner's "evidence of the [alleged harassment by] other employees" is "just not sufficient for a prima facie case." 2 Tr. 125-126.

Thus, the district court correctly found that petitioner failed to demonstrate that she was subjected to an actionable hostile work environment, and the court of appeals correctly affirmed that finding. In any event,

that fact-bound determination in an unpublished decision does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 2004